



Statement of

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On behalf of the National League of Cities

Before the House Committee on Government Oversight and Reform
Subcommittee on Intergovernmental Affairs

“Unfunded Mandates: Examining Federally Imposed Burdens on State and Local Governments”

April 26, 2017

Good morning, Mr. Chairman and Members of the Committee. I am Jermaine Reed, Councilmember from the City of Kansas City, Missouri. It is my pleasure to be with you today on behalf of the National League of Cities, the oldest and largest organization representing local elected officials in America’s cities and towns. NLC represents 19,000 cities and towns of all sizes across the country. I appreciate the opportunity to share the perspective and recommendations of local elected officials on how the federal government can reduce unfunded mandates and unnecessary regulatory burdens on local governments. We believe that by improving the Federalism consultation process and the way local government input is considered this can be achieved.

As cities across America are at the front lines implementing and leading on programs from education to healthcare and the environment, we look to our partners in Washington to offer support for coordinated and substantive results. As you will hear from me today, cities have come a long way in tackling issues around clean water, clean air and accessibility, to name a few, but we have also been burdened by unfunded mandates associated with these actions. As city budgets struggle to recover from the Great Recession, many of us are making tough choices about the services and maintenance that we can afford and in some instances taking actions to borrow and finance funds to address critical needs. Moreover, proposed federal budget cuts to critical programs would further reduce our ability to meet the everyday needs of our community, as well as add to the burden that unfunded mandates have on our city. This is not a sustainable situation and we urge Congress to reject the proposed cuts put forth by the Trump Administration. Additionally, with more opportunities for cities and local elected officials to be a part of the federal policy and rulemaking process, we hope that unfunded mandates and other

regulatory burdens can be identified and eliminated at an early stage. We look forward to an intergovernmental partnership that supports local flexibility and authority, provides the necessary resources, and avoids a “one-size-fits-all” approach.

Federalism Principles and the Intergovernmental Partnership

The intergovernmental partnership, through federalism, involves a cooperative partnership among local, state and federal governments, and must be strengthened through all levels of government. The principles of federalism require acknowledgement of the respective roles, duties, and responsibilities for each level of government. Federalism is promoted when boundaries of authority and responsibility are identified, delineated, and respected by all the partners of government.

Within the intergovernmental partnership, local governments are principally responsible for providing services, solving day-to-day public problems, and responding directly to the needs of citizens. Unfunded mandates impose additional disproportionate responsibilities on local governments, and increased uncertainty and financial liability, without regard to the fiscal impact of those policies. As such, their impact on the division of power within the intergovernmental partnership ultimately moves us further from our foundational principles of federalism.

Federalism, ultimately, is the constitutional relationship between state governments and the federal government. Cities are not mentioned in the U.S. Constitution and, instead, derive their powers from their respective state governments. For much of the early portion of American history, federal policy did not interfere with local government. Only since the 1930s has there been an active and direct federal-city relationship. This relationship has been largely defined by the power of the purse, meaning the federal government has used funding to induce cooperation from local governments. Unfunded mandates, however, distort this *quid pro quo* relationship by removing the federal government’s end of the bargain.

Furthermore, it is important to note that the capacity of city government to respond to federal demands is limited. While Kansas City has access to earnings, sales, and property taxes, most cities have access to only one or two streams of revenue. Additionally, states or voters in many areas have imposed caps on the revenues cities are able to raise, often by limiting increases in the property tax. NLC’s annual *City Fiscal Conditions*¹ survey research shows that city government revenues have not fully recovered from the Great Recession. The recovery of city finances has been protracted—10 years out, general fund revenues are still below pre-Recession levels. Cities have responded by making tough decisions to reduce services and lay off employees. As of this month, local government payrolls are still 58,600 jobs below their pre-Recession high.

Unfunded Mandates Reform Act and Executive Order 13132: Federalism

Cities saw a major victory on the unfunded mandates front in 1995 through a renewed focus on federalism. At the time, cities were seeing a rise in regulatory or “coercive federalism” through regulations, mandates and preemptions and a decline in fiscal federalism. In the half-century between 1945 and 1995, the number of federal mandates on state and local governments

¹ National League of Cities, “City Fiscal Conditions 2016,” October 16, 2016. Available at <http://www.nlc.org/resource/city-fiscal-conditions-2016>

increased from less than 10 to more than 100. Since the late 1970s, the federal government's share of local government general revenue has declined from about 15 percent to 4 percent.²

Today, as was true in 1995, fundamental questions about the roles and responsibilities of government are at the forefront of policy discussions—how to streamline the government, balance the federal budget, and shift policy responsibilities to states and local governments, and the private sector. Today, as was true in 1995, cities are concerned about whether federal programs can be reduced or eliminated without shifting the costs to local governments in the form of unfunded mandates. With the release of the President Trump's 2018 budget proposal, this question becomes a clear reality. With across-the-board proposed cuts to critical funding for cities through programs such as Community Development Block Grants (CDBG), Transportation Investment Generating Economic Recovery (TIGER) grants and 21st Century Community Learning Center grants for afterschool programs, just to name a few, the elimination of federal funding support and the resulting transfer of full responsibility for continuation of these programs to states and local governments would create new unfunded mandates.

The Unfunded Mandates Reform Act of 1995 (UMRA) aimed to address this burden by requiring federal agencies to assess the costs and benefits of a final rule that may result in the expenditure by state, local, and tribal governments, in the aggregate, of \$100 million or more. Under UMRA, this threshold amount also triggers the required intergovernmental consultation process between regulatory agencies and elected officials.

In 1999, President Clinton issued Executive Order 13132: Federalism (Executive Order) to “further the policies of the Unfunded Mandates Reform Act” and to “insure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies.” In addition to enumerating the basic principles of federalism, the Executive Order directed federal agencies to set up a consultation process “to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.”

Since 1997, the Congressional Budget Office (CBO) has assessed whether legislation considered by Congress contains unfunded mandates and whether any unfunded mandate costs exceeds the UMRA threshold. According to CBO, in the 19 years since UMRA became effective, there have been 13 laws with intergovernmental mandates that had costs estimated to exceed the statutory threshold, the last of which was enacted in 2010.³ Examples include increases in the minimum wage; minimum standards for issuing drivers licenses, identification cards and vital statistics documents; and requirements on rail and transit owners and operators.⁴

While this process is working in some agencies and for some programs, it remains clear at the local level that there is still a long way to go to ensure that input by local officials is a meaningful part of the regulatory process, and not merely a check of the box.

² U.S. Census, State and Local Government Finances 2014 data, December 9, 2016. Available at <https://www.census.gov/govs/local/>

³ Congressional Budget Office, “A Review of CBO's Activities in 2014 Under the Unfunded Mandates Reform Act,” March 31, 2015. Available at www.cbo.gov/publication/50051.

⁴ Ibid.

The Kansas City Experience

According to data from the U.S. Census Bureau, Kansas City is the 37th most populous city in the United States with over 460,000 residents. However, Kansas City is part of a bi-state metropolitan area of 2.1 million people that includes 172 cities and 15 counties. The city, with 319 square miles, has the 11th largest land area in the country among cities not consolidated with counties. Kansas City has been recognized nationally not only as a wonderful place for barbeque, but also as a place for small business and startup incubation and for having one of America's best downtowns. We are proud of our city, its residents and its programs.

Last month, my colleagues and I in the Kansas City Council approved a \$1.59 billion 2017-2018 budget, which takes effect on May 1 and has a strong focus on public safety and city services. While the budget increases services in some departments, we are very conscious of the uncertainty of federal funding support for cities in the coming years. In partnership with Mayor Sly James, we are thinking long and hard about how to build efficiencies while simultaneously maintaining our infrastructure and supporting our residents. To help us meet our maintenance needs, the city put forward an \$800 million General Obligation bond to the voters on April 4 to support critical deferred infrastructure maintenance, including sidewalk repairs, flood control improvements and building renovations and upgrades to satisfy ADA requirements. This package was approved by voters and we are hopeful that this will help us in addressing several billion dollars' worth of maintenance backlog that the city has been unable to address up to this point.

As with many cities, budgets are carefully considered to reflect the priorities and needs of our residents. This year's budget is no different and reflects the changing needs and demands of our growing city. That process, however, is upended each time we face an unfunded mandate. As these federal mandates arise, we are forced to choose between raising taxes, cutting services or delaying needed infrastructure projects. Is it right to choose between these mandates and fixing a necessary sewer line or cutting services to critical city programs? Each time we get an unfunded mandate, it requires locally-elected officials to disregard the will of our voters to meet the standards imposed by Congress or the Administration. The federal government must not initiate laws, rules and regulations, or take other actions and activities that will mandate action on the part of local governments. But, if they do, reimbursement funds must be provided to compensate local governments for such mandates.

The following are examples of unfunded mandates that Kansas City is facing in the areas of clean water, clean air and accessibility. As I mentioned earlier, we are not a small city, so we have the benefit of financial resources that smaller cities and towns are not afforded when faced with these same challenges. However, even with the benefit of size, Kansas City struggles at times to adapt to the changing regulations and laws that come without resources.

Clean Water

Our nation's aging water infrastructure is an issue of national concern. The U.S. Environmental Protection Agency (EPA) estimates that each year more than 850 billion gallons of combined sewer overflow is discharged into local streams and rivers.⁵ To address this public health

⁵ U.S. Environmental Protection Agency, "Report to Congress: Impacts and Control of CSOs and SSOs," August 2004. Available at https://www.epa.gov/sites/production/files/2015-10/documents/csosortc2004_full.pdf

concern, EPA estimates a total investment of \$57 billion dollars (2004 dollars) is needed to reduce combined sewer overflows (CSOs) across 772 communities. For the communities impacted by these CSOs, the burden of this and other unfunded mandates established under the Clean Water Act is great.

To meet our requirement under the Clean Water Act, in 2009, Kansas City developed a 25-year plan, the Smart Sewer Program, to reduce our combined sewer overflow volume from 6.4 billion gallons annually to 1.4 billion gallons annually. The program represents Kansas City's largest existing infrastructure investment and the first federal consent decree to incorporate green infrastructure solutions to improve water quality.

Our Smart Sewer Program includes 101 separate projects and will cost the city between \$4.5 and \$5 billion. The program is funded solely through wastewater revenues. As a result, we are significantly raising our wastewater rates and Kansas City customers are facing significantly higher bills. Residents in Kansas City have already faced seven years of double-digit rate increases, which have more than doubled the average monthly bill for consumers from \$48 in 2009 to \$102 per month today. The city must continue to raise rates annually to meet the requirements of our consent decree.

In addition to the requirements of Kansas City's consent decree, the city must also meet other unfunded mandates set forth under the Clean Water Act, including obligatory investments as part of the National Pollution Discharge Elimination System (NPDES) and Municipal Separate Storm Sewer System (MS4) permit requirements. Kansas City must invest another \$800 million in wastewater system upgrades to meet future NPDES regulations by the year 2035.

An area of concern that would threaten the effectiveness of an already modest revenue stream and frustrate the flexibility intended for MS4 systems is the Total Maximum Daily Load (TMDL) program. To be clear, the TMDL program is an important part of the Clean Water Act, especially when the TMDLs are developed in accordance with sound science and are implemented in a manner reflective of real world conditions. However, Congress, EPA and the states must take care to ensure that TMDLs do not erode the practicality of the MS4 legal standard, impose strict numeric effluent limits or mandate expensive infrastructure retrofits in order to achieve compliance.

Aside from the absence of revenue to meet unfunded mandates, we must consider a fundamental measure of appropriateness in asking one generation of taxpayers to remedy the infrastructure issues created by multiple generations. This is especially critical for communities like Kansas City where citizens are already dealing with affordability concerns connected with funding Clean Water Act programs and aging infrastructure.

Clean Air

When the Clean Air Act passed in 1963, it's safe to say that cities across America needed federal support to control air pollution on a national level and in our communities. Since that time, federal and state standards and programs have helped the Kansas City region significantly reduce our emissions and improve our air quality. Programs such as Congestion Mitigation Air Quality

(CMAQ) funding, the Diesel Emissions Reduction Act, and air quality planning, multipurpose, and research grants for air, climate and energy are instrumental to improving air quality in the Kansas City region. Without these programs, we jeopardize the progress made in both environmental quality and public health over the last fifty years.

Through early replacement or retrofitting of school buses, rail engines and other heavy-duty diesel vehicles, our air quality has improved around our schools and in our neighborhoods, protecting the health of those most vulnerable to adverse impacts of pollution. Additionally, bi-state coordination of air quality planning efforts has resulted in one of the nation's most robust air quality public education programs, as well as the EPA Clean Air Excellence Award for our Clean Air Action Plan, a voluntary plan to reduce emissions and improve public health adopted and endorsed by public and private partners in the Kansas City region.

Ozone levels in Kansas City are dependent upon local emissions, ozone concentrations in air masses moving into our area, and local weather conditions. Since the early 2000s, monitoring of compliance for regulations was taken over the State of Missouri and the Mid-America Regional Council. The regional planning agency for Greater Kansas City continues to assess the region's compliance with the National Ambient Air Quality Standards and implement the region's Clean Air Action Plan.

Looking forward, our city and region are planning for the possibility of a non-attainment designation when the national ground-level ozone 70 parts-per-billion standard goes into effect. If Kansas City falls out of attainment for air quality standards, it could be costly to implement changes to our Clean Air Action Plan and could discourage companies from locating or building in Kansas City because of the more stringent regulations.

Accessibility

When the Americans with Disabilities Act (ADA) was passed in 1990 and the first ADA Standards for new construction and renovations to existing buildings were implemented in 1991, most facilities were not ADA compliant. In Kansas City, many structures were never renovated to ADA compliance and, unfortunately, some renovations and some new construction was completed that was also not ADA compliant. As a result, the city found itself in the position of having to correct more than two decades of ADA violations with no set budget for the corrections and improvements.

The City of Kansas City entered into a Settlement Agreement with the U.S. Department of Justice (DOJ) in July 2012, under Project Civic Access (PACX), becoming the 200th city to enter in to such an agreement. The agreement called for many things, but the primary objective was to make the city ADA compliant within a six-year time frame. This includes all policies, buildings and programs, websites, curb ramps, etc. Complying with this vital civil rights legislation is of critical importance to our city and a large effort is underway to meet our Settlement Agreement and our obligations under the ADA.

Now nearly five years into the Settlement Agreement, we will be negotiating more time to complete the necessary upgrades as both the timeline for completion and its cost have become a burden. During the assessment of city assets, approximately 40,000 ADA violations were

discovered throughout all our facilities. This number includes each violation individually, such as every door pressure reading, each door knob, etc. Every violation was documented with photography and recorded. The assessments and recording of the violations alone took months. The city has remedied thousands of violations to date, but is currently completing its transition plan and will be requesting several additional years to bring our remaining facilities into full ADA compliance.

The cost of this work is estimated to be over \$100 million. To date, approximately \$25 million has been spent. The city's latest bond package, which was approved by voters on April 4, will provide an additional \$24 million for ADA improvements, but that is only a portion of our ADA obligations. There is still much to do and the funding has yet to be identified for these expenses. There is no easy solution and there is no single-size solution.

Cities and the Federal Government Should be Partners in the Rulemaking Process

While 2010 was the last time CBO identified a law as creating an unfunded mandate on local governments, many other unfunded mandates stem from the rulemaking process. As partners in the intergovernmental process and often serving as co-regulators, cities should be at the table when rules are being crafted to provide an important perspective on ensuring that rules are effective, implementable, offer local flexibility, avoid a "one-size-fits-all" approach, and avoid an unfunded mandate. The feedback and input that local elected officials provide during the federalism consultation process should be considered in such a manner that it can truly help shape and inform the rulemaking so that issues as I just detailed in Kansas City do not continue to be created.

Example: U.S. Environmental Protection Agency

Under UMRA and the Executive Order, each federal agency adopted guidance for consulting with state and local governments on federal regulatory actions, but the consultation processes differ by agency, and as a result the Executive Order is applied inconsistently across the federal government. While many unfunded mandates stem from the EPA, the Agency should be commended for improving the consultation process with state and local governments.

In 2008, EPA undertook a review of its Federalism guidance and, with NLC's urging, lowered the intergovernmental consultation threshold to \$25 million in the "spirit" of federalism to improve the way the Agency defines, conducts and makes regulatory decisions. Since this time, NLC and the other state and local government groups have been consulted with on over 20 different rulemaking procedures. By comparison, since the Executive Order was issued in 1999 through 2008, only two EPA regulations were found to have aggregate costs to state and local governments above the \$100 million threshold for triggering the intergovernmental consultation process. While EPA has one of the most robust state and local government consultation processes, rulemakings are often done in silos, but there is a cumulative effect of each of the Agency's individual rulemakings at the local level where elected officials have to look holistically and make tough decisions about where to invest their limited financial resources.

Moreover, there are times when we believe the Agency falls short in the consultation process, as well as in conducting the fiscal analysis that accompanies rulemakings. Over the past several years, NLC has identified several rulemakings where we believe EPA has not engaged in a

“meaningful and timely” consultation process or where the Agency has underestimated or not fully considered the actual cost to local governments.

Recommendation: Improve the Federalism consultation process and the way local government input is considered.

The federalism consultation process could be improved through consistent guidance across federal agencies that requires early analysis and consultation with state and local leaders during the rulemaking process, as well as a lower consultation threshold, as implemented by EPA for example. With more opportunities for cities and local elected officials to be a part of the rulemaking process, potential unfunded mandates and other regulatory burdens could be identified and eliminated at an early stage.

For this process to be successful, the federal government must fully evaluate and consider the full range of impacts of regulations on local governments, including a complete cost-benefit and risk assessment of proposed rules early in the regulatory process, and use the feedback and input from local governments in a way that can inform that work. Federal policies and rules must provide states and local governments with sufficient time for implementation and maximum flexibility in the administration and maintenance of federal programs. As we’ve seen in Kansas City, it isn’t a “one-size-fits-all” at the local level, and by involving leaders from cities in the process together we can avoid unnecessary budgetary burdens and unfunded mandates while simultaneously achieving strong outcomes.

While the federalism consultation process can be improved, it is an essential component of the intergovernmental process, and local elected officials value the opportunity to provide direct input into the rulemaking process before rules are even drafted. This early feedback and input helps the federal government develop rules that are effective, reasonable, and implementable at the local level. We continue to urge the federal government to listen to and consider the perspective of local governments early and often during the rulemaking process.

In conclusion, working together, cities and the federal government can craft laws, policies and rules that meet our mutual goals of protecting the health, safety and welfare of our citizens, while relieving the pressure of unfunded mandates on local governments.

On behalf of the National League of Cities and the City of Kansas City, I thank you for the opportunity to submit this testimony on this critical issue. I look forward to your questions.